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JOSEPH F. SPANIOL, J.
CLERK

No. 89-1730

In The
Supreme Court of the United States
October Term, 1989

SUSANNE C. FINK,

Petitioner,

v.

PETER FINK,

Respondent.

On Petition for Writ of Certiorari To
The Court of Appeals of The State
of California, Second Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether federal law is limited by a state trial court's decision holding a family residence of the parties to be their community property and by so doing voiding as a fraud on creditors an oral agreement between the marital parties concerning title to said residence.
2. Whether the Securities and Exchange Act of 1934 preempts a state court's jurisdiction over the acts, conduct and agreements between a husband and wife as to their marital property merely because the husband was employed as a stockbroker at the time of the transaction but where he did not deal with his wife in a position of stockbroker and client.
3. Whether when brought to the attention of the state appellate court for the first time on appeal, the duties of a stockbroker to his clients as delineated under the Securities and Exchange Act of 1934 are relevant and preempt a trial court's jurisdiction to adjudicate marital property as property to be held by them as tenants-in-common where the transaction between husband and wife does not fall within the purview of the Act.
4. Whether a state appellate's decision breaches the integrity of the Securities and Exchange Act of 1933 (15 U.S.C., Section 77a, et seq.) and the Securities Act of 1934 (15 U.S.C., Section 78a, et seq.) where it held as irrelevant the applicability of said statutes to real property held pursuant an oral agreement between a husband and a wife where such agreement was held by the trial court to be fraud upon the creditors of the marital community.

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The ground for the Petition is Petitioner's contention that the State Appellate Court erred in upholding a trial court's decision which voided as a fraud on creditors an executed oral agreement of parties and as a result thereof ruled that subject real property of the parties be held Petitioner's and Respondent's tenancy in common.

OPINIONS BELOW

The opinion of the District Court of Appeals of the Supreme Court, Second Appellate District was rendered

on November 22, 1989. Rehearing was subsequently denied. Petitioner's Petition for Review to the California Supreme Court was denied on February 14, 1990.

JURISDICTION

Petitioner claims this court's jurisdiction by Article VI, Clause 12 of the United States Constitution and the holding of *Hisquierdo v. Hisquierdo*, 349 U.S. 572 (1979).

STATEMENT OF THE CASE

Respondent adopts by reference the statement of the case contained in the opinion of the Court of Appeal of the State of California, 2nd Appellate District, set forth in Appendix to the Petition at A-2 to A-16, inclusive.

ARGUMENT

Petitioner is seeking to persuade this Court that a federal issue of law applies on the sole basis of Respondent's occupation as a stockbroker when he entered into an agreement with his wife, thereby violating a statutory duty to the 1934 Act, which agreement the trial court found to be a fraud on the creditors of the parties. The Petitioner seeks to have this court effectuate an agreement of the parties designed to defraud their creditors and thereby reward Petitioner on the basis that Respondent defaulted in his duties to his clients as promulgated by the 1934 Act.

POINT I

Respondent contends that the 1934 Act was never intended to extend to dealings between husband and wife in a non-security context. Respondent further contends that this court is not the forum in which the punishment or adjudication of his activities with his wife should take place. The fact that Respondent was, during the marriage, a licensed broker under the 1934 Act, is irrelevant to the issues before the trial and appellate courts. No issues concerning the applicability of the 1934 Act or regulation promulgated thereunder are involved. No federal issues are involved. The trial court had appropriate jurisdiction over the person of Respondent and Petitioner and their property to adjudicate the marital relationship and the agreements between them.

By refusing to enforce the oral agreement between the parties, which the trial court found to be illegal, the trial court negated the effect of the purported title transfer to Petitioner and placed the parties back where they were prior to the agreement. By finding that at that time of the agreement, the property was the community property of the parties, the court appropriately found that the property involved was the community property of the parties at the time of the trial and to be henceforth held by them as tenants-in-common.

POINT II

The California Appellate Court's decision in its footnote number 2 (Petitioner's Petition for Writ of Certiorari, page A-16), states:

"We reject as patently unsound, Susanne's claim that the Cortez house must be deemed to be her separate property on the theory that to characterize it as community property would impermissibly reward Peter's illegal attempt to defraud creditors. To the contrary, if the property were deemed to be Susanne's separate property, then creditors, if any, would be defrauded, since Peter's interest in the house would be immune from creditor's liens. Moreover, Susanne's reliance on The Securities Exchange Act of 1934 and related cases, e.g., *Boruski v. Securities and Exchange Commission* (2d Cir 1965) 340 F.2d 991, is patently misplaced. Peter's duty, as a broker, under that Act, is owed to his clients, not to his spouse, Susanne."

The basis of Petitioner's claim is solely founded on the nature of Respondent's employment as a licensed stockbroker. It is acknowledged that Respondent has defined obligations to his brokerage customers and to specific regulatory agencies which govern his employment. These, however, are not the same duties he owed to his wife. Respondent's and Petitioner's agreement concerning their residence is outside the scope of the Securities and Exchange Commission or any other agency which governs his employment or the 1934 Act. His conduct towards his wife (as a husband and where she is not a business customer of Respondent) is governed by state law. The California court made no finding, nor did its Judgment in this matter adjudicate any aspect of Respondent's employment or any of the rules and regulations of a securities broker.

POINT III

The case of *Boruski v. Securities and Exchange Commission*, 340 F 2d 991 (2d Cir. 1965), was a review of particular disciplinary action taken by the Securities and Exchange Commission against a broker for alleged violations of his duties as a broker. It was a proceeding between the regulatory agency and an individual subject to the rules of that agency involving acts of his employment. The issue was the reasonableness of the regulations and the proceedings of the commission. The case dealt with Mr. Boruski's conduct as a broker not as a husband. The Appellate Court found that the punishment was warranted and the regulations reasonable.

Petitioner can find little solace in *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 59 L Ed 489 (1979). The preference of jurisdiction in divorce matters is with the state courts. In the *Hisquierdo* case, a particular act of Congress, the Railroad Retirement Act of 1974 was involved. The state court attempted to allocate the husband's retirement account in the plan between the husband and wife (husband was a railroad employee). This court stated that the state court did not have the jurisdiction to allocate the husband's interest in the exclusively federally created plan; one created by an Act of Congress and which, by its own terms, excluded any state process.

The case at the bar is entirely different. The agreement with Respondent and his wife with respect to how title would be held to their home does not involve Federal Law. The fact that Respondent was a stockbroker is irrelevant to the issue, since he was not dealing with his wife in these circumstances as a securities client.

In those few cases involving divorce and federal issues, this court consistently found that federal preemption applies in only the most unusual circumstances. In *Hisquierdo*, it was an issue involving a specific Act of Congress; the Railroad Retirement Act of 1974; in *United States v. Yazell*, 382 U.S. 341 (1966), it precluded a state court from changing the terms of federally issued bonds. However in *Ohio ex rel Popovici v. Adler*, 280 U.S. 379 (1930), the State was the appropriate jurisdiction with respect to a divorce action between the United States citizen wife against the husband, a citizen of Romania, notwithstanding Article III of Section II of the United States Constitution.

In other federally related matters, the state court's jurisdiction in marital issues was upheld, notwithstanding incidental Federal interests. In *Rose v. Rose*, 481 U.S. 619 (1987), this court affirmed the state's jurisdiction to hold a disabled veteran in contempt and permitted the issuance of a writ of execution for the collection of past child support upon his U.S. disability payments. In *Wetmore v. Markoe*, 196 U.S. 68 (1904), both spousal and child support were held to be nondischargeable in bankruptcy and not in conflict with the bankruptcy act as established by federal statute.

Under California law, testimony is permissible to establish an oral agreement between a husband and a wife, which agreement may vary the terms of a written document. See *In re Marriage of Frapwell*, 49 Cal App 3d 597, 601 (1975). The trial court found the agreement between Petitioner and Respondent existed, negated it and placed the parties into their preagreement position.

The State Court did nothing to limit or rule upon Respondent's duties as a stockbroker under the 1934 Act. The state decision did not condone nor license registered brokers to conceal assets or to do anything illegal. The court, by affirming the trial ruling, did not enforce an agreement between a Husband and a Wife, which was fraudulent.

Petitioner's contention to creditor liens and the fact that there was no evidence that Respondent would pay creditors instead of immediately hiding assets once again as raised in page 22 of the Petition is irrelevant. The trial court did not rule on Respondent's conduct as a stockbroker. The trial court ruled that the Cortez residence was the community property of the parties, and the oral agreement concerning the property was unenforceable. As a result of the trial court's judgment, the parties were to hold the property as tenants-in-common. To hold the Cortez residence as Petitioner would accomplish the fraudulent act of the parties. Petitioner's statement in paragraph C on page 23 of her petition is without foundation. The decision makes no reference to nor seeks to apply to any relationship of a stockbroker to his clients nor to the duties of a stockbroker to his customers under the 1934 Act.

POINT IV

Point IV is the claim. Petitioner wanted the District Court of Appeals of the State of California and the California Supreme Court to punish Respondent. She wants the court to reward her for her own wrongdoing by

permitting her to solely benefit by a fraudulent agreement with Respondent. The court of California appropriately would not permit Petitioner to so benefit.

CONCLUSION

Respondent respectfully submits that certiorari should be denied, that this court should put this matter to final rest by finding that this is a state issue involved dealing with state marital property of which there is no federal interest in this circumstance.

Respectfully submitted,

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